SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-015011 01/03/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STEVEN KENNER, et al. H NORMAN STONE

v.

DAVID YETTS, et al. MICHAEL P FIFLIS

GLENDALE JUSTICE COURT
REMAND DESK CV-CCC

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This Court has taken this matter under advisement and has reviewed the memoranda of counsel and the record of the Glendale Justice Court.

On review, this Court may consider only matters in the record. The appellate court reviews the evidence in a light most favorable to sustaining the judgment.[1] Furthermore, material not contained in the record is generally presumed to support the trial court's ruling.[2]

Appellants claim the denial of procedural due process by the introduction of inadmissible hearsay; therefore, this Court considers the appeal *de novo.*[3] A case dealing with a protected right is subject to plain error review[4] and subject to the harmless error standard.[5]

[1] *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).
[2] *National Advertising Co. v. Arizona Dept of Transp.*, 126 Ariz. 542, 544, 617 P.2d 50, 52 (App.1980).
[3] *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 927 P.2d 776 (1996); *Ramirez v. Health Partners of Southern Arizona*, 193 Ariz. 325, 972 P.2d 658 (App. 1998).
[4] *United States v. Necoechea*, 986 F.2d 1273 (9th Cir. 1993).
[5] *United States v. Rivera*, 900 F.2d 1462, 1470 n.6 (10th Cir. 1990).

Generally, "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[6] The statement can be "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[7] It usually is inadmissible because courts consider such evidence unreliable. Declarant was not under oath, could not be charged with perjury, and was unavailable for cross-examination. Nonetheless, Rule 803 provides limited hearsay exceptions calling for court discretion.

In this forcible detainer action, the Glendale Justice Court admitted Appellees' Trial Exhibit 3, a hearsay statement by the contractor, Mr. Greenman.[8] The court subsequently awarded Appellees $1,000.00 in back rent and $56.00 in costs.[9]

Appellees contend that the evidence was properly admitted as a hearsay exception under Rule 803(24). Appellants, on the other hand, cite the same rule to argue the opposite conclusion. Rule 803(24) reads specifically:

> Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial[.] The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> * * *
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that:
> A. the statement is offered as evidence of a material fact;
> B. the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
> C. the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
>
> However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.[10]

[6] 17A A. R. S. Rules of Evid., Rule 801(c) (2002).
[7] 17A A. R. S. Rules of Evid., Rule 801(a) (2002).
[8] Appellee's Memorandum, p. 5.
[9] Judgment of the Glendale Justice Court July 17, 2002.
[10] 17A A. R. S. Rules of Evid., Rule 803(24) (2002).

First, the statement was offered to prove that Appellants impeded repairs to the dwelling.[11] The record does not indicate that the trial court considered the hearsay exception with any particular care. Appellants argue that ". . . the trial court did not make any reference to a hearsay exception" [emphasis in original].[12]

Second, the trial court had no other evidence on which to base its finding that the "repairs [could] have been completed within two weeks . . . had defendants [allegedly not] . . . restricted access . . . . [to the dwelling]"[13] Therefore, admission of the evidence fails the *harmless error* standard since there was no other evidence to support a finding of impeding repairs.[14] Third, whenever hearsay is admitted, implicit rulings are insufficient. Rule 803(24) requires the trial court to determine reasons for allowing the hearsay into evidence and explain how justice was served.[15] Lastly, the opposing party was given no notice that would permit appropriate trial preparation. Admission of the statement came as a surprise at trial[16] contrary to Rule 803(24), and clearly prejudiced Appellants.

Finding the admission of inadmissible hearsay and resulting prejudicial error,

IT IS THEREFORE ORDERED reversing the judgment of the Glendale Justice Court.

IT IS FURTHER ORDERED remanding this case to the Glendale Justice Court for retrial in a manner not inconsistent with this opinion.

[11] Appellants' Reply Memorandum, p. 6.
[12] Appellants' Reply Memorandum, p. 5.
[13] Id.
[14] *State v. Luzanilla*, 179 Ariz. 391, 393, 880 P.2d 611, 613 (1994).
[15] See generally *State v. Thompson*, 167 Ariz. 230, *805 P.2d 1051 (Ariz. App. 1990).*
[16] Appellant's Reply Memorandum, p. 5.